IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

JUDGMENT

Nirbhaya. Versus State of Rajasthan.

S.B. Criminal Appeal No. 25/2003 against the judgment and order dated 16-12-2002 passed by the Special Judge, NDPS Cases, Chittorgarh, in Sessions Case No. 19/2001.

...

Date of Judgment: April 13, 2006

PRESENT

HON'BLE MR. JUSTICE H.R. PANWAR

Mr. R.K. Charan, for the appellant.
Mr. JPS Chaudhary, Public Prosecutor for the State.

BY THE COURT:

Reportable.

This criminal appeal under Section 374 (2) of the Code of Criminal Procedure, 1973 (for short, "the Code" hereinafter) is directed against the judgment and order dated 16-12-2002 passed by the Special Judge, NDPS Cases, Chittorgarh (for short, "the trial Court" hereinafter) in Sessions Case No. 19/2001, whereby the trial Court convicted the appellant for the offence under Section 8/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short, "the NDPS Act" hereinafter) and sentenced him to undergo ten years' rigorous imprisonment and a fine of Rs. One lac, in default of payment of fine further to undergo three months' simple imprisonment. Aggrieved by the judgment and order impugned convicting and sentencing the appellant, the appellant has filed

the instant appeal.

I have heard learned counsel for the appellant and the Public Prosecutor for the State. Carefully gone through the judgment and order impugned. I have carefully scrutinized, scanned and evaluated the evidence and the record of the trial Court.

It is contended by the learned counsel for the appellant that PW 5 Anil Joshi, the seizure officer, stated that two samples of 30 grams each were taken from the contraband opium seized from the appellant from a polythene bag and put in a metallic tin container and covered by cloth, whereas in the seizure memo EX.P/3, it has not been been mentioned that the samples were sealed in a polythene bag. It is further contended that even in the previous statement EX.D/5, it has not been stated that the samples were taken in a polythene bag. The word ”polythene” has not been mentioned in the seizure memo EX.P./3 and the statement EX.D/5; however, PW 5 Anil Joshi, the seizure officer, in his statement recorded by the trial Court, stated that he took two samples of 30 grams each from a plastic bag and put it in a metallic tin and thereafter covered it by a cloth. Learned counsel further submits that PW 3 Lachchhi Ram and PW 4 Pratap Singh also did not state in their statements that the samples were taken from a plastic bag and put in a metallic tin. It was further contended that two samples of 30 grams each

of the contraband opium were taken from the appellant, whereas the report of the State Forensic Science Laboratory, Jaipur. EX.P/23. shows that when it was chemically examined by the FSL, the substance weighed 15.100 grams along with the polythene bag and, therefore, there is variance in the weight of the samples taken from the contraband opium, which according to the learned counsel, creates a doubt in the prosecution case. Learned counsel further contended that no specimen seal was sent along with the sample of the contraband to the FSL as PW 12 Kailash Chandra stated that on the Furd of specimen seal, there was neither the signature of the appellant, nor that of the Motbirs. PW 12 Kailash Chandra is the person who carried the sealed packet of the sample to the FSL. It was also contended that the secret information received by the seizure officer has not been sent to the immediate higher officer and even if it was sent then it was not received on the same day, vide EX.P/11.

Learned Public Prosecutor appearing for the State supported the judgment and order impugned and contended that the contraband opium weighing 3.900 kgs was recovered from the personal possession of the appellant and the appellant failed to account for the possession of such a huge quantity of opium. Learned Public Prosecutor further submits that the search and seizure have been proved by the statements of the seizure officer PW 5 Anil Joshi, PW 3 Lachchhi Ram and PW 4 Pratap

Singh. A specimen seal was prepared by the seizure officer and the contraband opium as also the samples taken therefrom were sealed on the spot by affixing the seal of the seizure officer, which was subsequently destroyed by the seizure officer after completing the sealing proceedings. Learned Public Prosecutor further submits that PW 12 Kailash Chandra carried the samples of the contraband opium along with the Furd of specimen seal to the FSL in a sealed packet and, therefore, he had hardly any occasion to know as to whether the Furd of specimen seal forwarded along with the sample to the FSL was bearing the signatures of the appellant and the Motbirs or not and, therefore, the statement of PW 12 Kailash Chandra to this effect is of no consequence. More so, according to the learned Public Prosecutor, the FSL report EX.P/23 clearly shows that the packet marked "A" enclosed within the cloth-cover which was properly sealed bearing the impressions, which tallied with the specimen seal impression forwarded to and received by the FSL, whereon the seals were found intact and, therefore, any casual statement made by the carrier of the sealed packet to FSL regarding absence of signatures of the appellant and the Motbirs on the specimen seal, is of no consequence. According to the learned Public Prosecutor, it is nobody's case that PW 12 Kailash Chandra, who carried the sealed packet of the sample and the specimen seal, had any occasion to open the sealed packet. So

far as variance in the weight of the sample received by the FSL is concerned, according to the learned Public Proseceutor, in the report EX.P/23 itself, it has been mentioned that the variance in the weight is subjected to the loss of moisture contents and, therefore, after lapse of time, due to loss of moisture, the weight is bound to reduce. However, the Public Prosecutor submits that since the FSL report has not been assailed by the appellant, therefore, even if there is any variance in the weight on account of loss of moisture, the prosecution case cannot be doubted on this ground. So far as loss of non-mentioning of the words "polythene bag" in the seizure memo is concerned, PW 5 Anil Joshi, the seizure officer, has categorically stated in his statement, which finds corroboration from EX.P/23, that the sample which was received by the FSL contained dark brown coloured semi-solid sticky substance having characteristics smell enclosed in a polythene bag which was packed in metallic tin container and thus, the statement of PW 5 Anil Joshi finds corroboration from the FSL report EX.P/23.

I have given my thoughtful consideration to the rival submissions made by the learned counsel for the parties.

PW 5 Anil Joshi is the seizure officer, who stated that on 30-1-2001, while he was Station House Officer, Police Station, Bhadesar, he received a secret information EX.P/11 at 2:30 PM that the appellant is going towards village Nardhari with

opium to sell it. The information was found reliable and, therefore, it was reduced to writing in the Roznamcha-Aam and was sent to the higher officer, i.e. the Superintendent of Police, Chittorgarh and the Additional Superintendent of Police, Chittorgarh through Constable PW 13 Shyam Lal. Thereafter he, along with PW 3 Lacchi Ram and PW 4 Pratap Singh, both police officials, went to the place informed in the secret information. He has proved recording of the secret information in Roznamcha vide EX.P/14, copy of which is EX.P/14-A. Two Motbirs were summoned, namely PW 1 Mithu Lal and PW 2 Onkar Lal and they were apprised of the secret information. A notice to become Motbirs was served to them and their consent was obtained vide EX.P/1 and EX.P/9 respectively. At about 4:15 PM, a person was found coming with a bag in his hand from village Bansen side. He was surrounded by the police officials. On being inquired, he disclosed his name as appellant Nirbhaya. He was informed about the secret information and thereafter a notice under Section 50 of the NDPS Act was served on him giving him an option to be searched in the presence of a magistrate, gazetted officer or by the SHO himself, vide EX.P/2. The appellant exercised the option to be searched by the S.H.O. himself and thereafter the bag, which the appellant was holding in his hand, was searched and it was found containing 3.900 kgs of opium. Two samples of 30 grams each were taken in a plastic bag and

put in a metallic tin and covered with a cloth. The specimen seal was prepared on the spot. Both the samples and the remaining contraband opium were sealed on the spot. The seizure memo EX.P/3 and the Furd of specimen seal, with which the articles were sealed, EX.P/4, were prepared. The appellant was apprised of the ground of his arrest in compliance of Section 52 of the NDPS Act vide EX.P/5 and vide EX.P/6, he was arrested. Vide EX.P/15, the Parcha-Kaymi was drawn and the case was registered against the appellant for the offence under Section 8/18 of the NDPS Act. A Chak FIR EX.P/16 was prepared. The seized contraband opium and the samples were deposited with the Malkhana Incharge in compliance of Section 55 of the NDPS Act vide EX.P/7. A detailed report regarding search, seizure and arrest, as envisaged under Section 57 of the NDPS Act was sent to the Superintendent of Police, Chittorgarh vide EX.P/17. The sample was marked as Article "A" and the control-sample was marked as Article "B". In cross-examination, he stated that the seal, which was used for sealing the contraband opium and the samples taken therefrom, after using it, was destroyed. He stated that taking of samples in plastic bag has been written in the seizure memo, however in EX.D/5, it has been specifically not mentioned that the samples were taken in plastic bag.

PW 1 Mithu Lal and PW 2 Onkar Lal are the Motbirs,

who admitted that they were called to be Motbirs in the appellant's case and put their signatures on the notice EX.P/1 and EX.P/9, notice under Section 50 of the NDPS Act given to the appellant EX.P/2, seizure memo EX.P/3, specimen seal memo EX.P/4, notice to the appellant showing the ground of his arrest EX.P/5, the arrest memo EX.P/6 and the Furd EX.P/7 prepared in compliance of Section 55 of the NDPS Act. However, these witnesses did not support the prosecution case in part and, therefore, they were declared hostile and subjected to cross-examination by the Public Prosecutor. Be that as it may, both these witnesses stated that they were called as Motbirs in appellant's case and have voluntarily signed the various Furds noticed above, which bear their signatures. These witnesses have not denied their signatures on various Furds noticed above.

PW 3 Lachchhi Ram, PW 4 Pratap Singh and PW 6 Choth Mal are the police officials who accompanied PW 5 Anil Joshi, the seizure officer, and the search and seizure were made in their presence. All these witnesses have stated that on 30-1-2001, while they were posted at the Police Station, Bhadesar on the post of A.S.I. And Head Constable respectively, PW 5 Anil Joshi, S.H.O., Police Station, Bhadesar, informed them that he had received a secret information that one person namely Nirbhaya is coming from village Bansen and going to village

Nardhari with opium. They were asked to accompany the seizure officer in a govenrment jeep. From the bus stand, two Motbirs were taken and a Nakabandi was held. At about 4:15 PM, one person came having a bag in his hand. He was surrounded by PW 5 Anil Joshi and the other witnesses. On being asked, that person disclosed his name as appellant Nirbhaya. He was served with a written notice giving him an option to be searched in the presence of a magistrate, gazetted officer or the concerned S.H.O. Thereafter the appellant exercised the option to be searched by the S.H.O. Thereafter the bag, which the appellant was carrying in his right hand, was searched by PW 5 Anil Joshi and on search, it was found containing opium weighing 3.900 kgs. Two samples of 30 grams each were taken and sealed in a metallic tin and marked Articles A and B. PW 5 Anil Joshi, from his own seal, sealed both the samples and the remaining contraband opium. The Motbirs and the persons who witnessed the search and seizure have also signed the Furds. These witnesses have proved their signatures on seizure memo EX.P/3. The appellant, on being asked whether he had a licence or permit to possess or carry the contraband opium, he denied to have any such licence or permit. The appellant was identified by these witnesses in the Court.

The statements of these witnesses are consistent to the extent that a secret information was received by PW 5 Anil

Joshi, which was sent to the higher officer and thereafter as per the secret information, PW 5 Anil Joshi, along with other police officials went to the place disclosed in the secret information. On the way, two Motbirs were called and their consent to become Motbirs were obtained. Thereafter a Nakabandi was held and the appellant was found coming from Bansen side and going toward Nardhari. After apprising the appellant about the secret information, a notice under Section 50 of the NDPS Act was given to the appellant and on search being carried out, the appellant was found in possession of contraband opium weighing 3.900 kgs. It has also been established that two samples of 30 grams each were taken and after sealing them, they were marked as Article A and Article B. It has also been proved that after seizure of the contraband opium, two samples along with remaining contraband opium and the specimen seal were deposited with the Malkhana with PW 6 Choth Mal, who, at the relevant time, was the Malkhana Incharge in absence of regular Malkhana Incharge PW 11 Ganpat Lal, who was on leave. The articles marked A, B and C, in the sealed condition, were received in the Malkhana vide EX.P/7. PW 6 Choth Mal has proved his signature on EX.P/7 at the place marked I to J and the endorsement was made regarding receipt of seized articles marked A, B and C in sealed-chit condition. The articles were deposited in the Malkhana vide EX.P/21 and a copy of which is

EX.P/21-A.

PW 7 Prahlad Singh stated that on 14-3-2001, the Malkhana Incharge PW 11 Ganpat Lal gave him a sealed packet to be carried to the Office of the Superintendent of Police, Chittorgarh for getting the forwarding letter prepared. He took the article in a sealed condition, went to the Office of the Superintendent of Police, Chittorgarh, got the forwarding letter prepared and along with the forwarding letter, went to FSL and handed over the article to FSL vide receipt EX.P/19. He stated that right from taking the sample from the Malkhana till he deposited it with the FSL, the same was in his safe custody.

PW 8 Rakesh Kumar is the person, to whom the subsequent investigation was entrusted. He prepared the site map EX.D/1 and recorded the statements of witnesses etc. However, he stated that the specimen seal was not separately handed over to him but on the seizure memo, the impression of specimen seal was there.

PW 11 Ganpat Lal is the Malkhana Incharge and stated that on 30-1-2001, he was on leave and the charge of the Malkhana was handed over to PW 6 Choth Mal, who deposited the articles i.e. the contraband opium and the samples etc. in the Malkhana, which, on resuming the duty, were handed dover to him by PW 6 Choth Mal. On 14-3-2001, the control sample marked Article-A, in a sealed condition, was sent through PW 7

Prahlad Singh to the Office of the Superintendent of Police for getting the forwarding letter prepared and thereafter to deposit with the FSL. On 17-3-2001, PW 7 Prahlad Singh came back after depositing the article with the FSL and handed over a receipt which was recorded in the Malkhana Register.

PW 12 Kailash Chandra, a police official posted in the Office of the Superintendent of Police, Chittorgarh, stated that PW 7 Prahlad Singh brought the sample along with a letter of Crime Report No.17/2001 under Section 8/18 of the NDPS Act. The sample, on being checked, was found properly sealed and thereafter a forwarding letter was prepared, which was handed over to Prahlad Singh, who, along with the forwarding letter, took the sample to FSL and deposited with him vide forwarding letter EX.P/20 and the receipt from the FSL EX.P/19.

PW 13 Shyam Lal is the person, who carried the secret information to the higher officer and stated that he gave the information to the Deputy Superintendent of Police on 30.1.2000 itself, though the date written therein is 30-4-2000. However, he has not stated that this date was mentioned by the Deputy Superintendent of Police.

From the statements of witnesses noticed above, it has also been established that on search, the appellant was found in possession of contraband opium weighing 3.900 kgs. and two samples of 30 grams each were taken therefrom. The

samples and the remaining contraband opium were sealed on the spot by PW 5 Anil Joshi, the seizure officer. The specimen seal was prepared, as also the memo of specimen seal EX.P/4, which was received by the FSL along with the sample vide EX.P/23 and tallied the seal affixed on the sample with the specimen seal forwarded.

So far as reduction of weight of the sample is concerned, the FSL report EX.P/23 itself shows that the reduction of the weight of the sample was due to loss of moisture. More so, at no point of time, the appellant challenged the FSL report and, therefore, in view of the decision of the Hon'ble Supreme Court in Ashok Kumar Vs. State of Haryana, 2000 SCC (Cri.) 506, the reduction in the weight of the sample is of no consequence. In Ashok Kumar's case (supra), the Hon'ble Supreme Court has held that when the report of the Chemical Analyser clearly establishes that the articles examined by him were the articles connected with that case and neither the report of Chemical Analyser was challenged nor was any application given for examining him as a witness to establish that the seals on the samples were faint when written by him and it was not possible to say whose seals they were and, therefore, the contentions raised in this respect were found to be without substance. In Madan Lal & Anr. Vs. State of Himachal Pradesh, 2003 SCC (Cri.) 1664, the Hon'ble Supreme Court,

while considering the reduction in weight of the sample sent for analysis, rejecting the allegation of tampering with the seals, held that the allegation has rightly been rejected by the Courts below giving reasons that there was very minimal and almost ignorable variation in weight.

So far as minor contradictions with regard to taking the sample in polythene bags is concerned, PW 5 Anil Joshi, the seizure officer, categorically stated that he took the samples in polythene bags, which finds corroboration from the FSL report EX.P/23 that the sample was received in a polythene bag.

So far as sending the information to the higher officer EX.P/11 is concerned, PW 5 Anil Joshi stated that it was sent immediately through PW 13 Shyam Lal. EX.P/11 bears the date as 30-1-2001 and it was handed over to the Deputy Superintendent of Police, Chittorgarh on 30-1-2001 itself and, therefore, on account of wrong mention of the date, it cannot be said that it was written by the Deputy Superintendent of Police.

So far as question of forwarding the memo of specimen seal is concerned, the witnesses stated that the memo of specimen seal was prepared and it was sent to the FSL along with the sample. The FSL report clearly goes to show that they received the sample along with a memo of specimen seal, which was tallied with the seals affixed on the sample.

On close scrutiny of the statements of the

prosecution witnesses, as discussed here-in-above, in my view, the prosecution has proved the case beyond reasonable doubt against the appellant that the appellant was found in conscious possession of the contraband opium weighing 3.900 kgs without any permit or licence, which is a commercial quantity. In the circumstances, therefore, I do not find any error, illegality or perversity in the impugned judgment convicting and sentencing the appellant.

Consequently, the appeal fails and it is hereby dismissed. The judgment and order impugned dated 16.12.2002 passed by the Special Judge, NDPS Cases, Chittorgarh in Sessions Case No. 19/2001, convicting and sentencing the appellant for the offence under Section 8/18 of the NDPS Act, is affirmed.

(H.R. PANWAR), J.

mcs